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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 184

ARKANSAS VALLEY G & T, INC., et al., Petitioners,

v.

FEDERAL POWER COMMISSION, et al., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joint Brief in Opposition for Respondents Dairyland Power Cooperative, Minnkota Power Cooperative, Inc., and Committee of Rural Electric Cooperatives, Seven Statewide Associations of Rural Electric Cooperatives and Eighty-Three Rural Electric Cooperatives

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July 29, 1968

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A-I, pp. 1a-15a) is reported at 391 F.2d 470. The order of the Court of Appeals denying rehearing is printed as Appendix A-II (p. 16a) to Petitioners' petition for a writ of certiorari. The order of the Federal Power Commission ("Commission") is reported at 37 FPC 495 (Pet. App. A-III, pp. 17a-21a). The order of the Commission denying rehearing and motion for stay is printed as Appendix A-IV to the petition for a writ of certiorari (pp. 22a-25a). The opinion of the Commission in *Dairyland*

Power Cooperative, et al., upon which the Commission relied as authority for its order in this case, is reported at 37 FPC 12.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1968 (Pet. App. A-I, p. 1a). Rehearing was denied on March 14, 1968 (Pet. App. A-II, p. 16a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether rural electric cooperatives financed by loans from, and under the supervision and control of, the Rural Electrification Administration ("REA"), which may be engaged in the sale or transmission of electric energy in interstate commerce, are subject to the Commission's jurisdiction under Parts II and III of the Federal Power Act ("Power Act") as "public utilities" as that term is defined in the Act.[1]

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[1] The Commission's ruling that REA-financed rural electric cooperatives are not subject to Parts II and III of the Federal Power Act was based on two separate, alternate grounds: (1) that rural electric cooperatives are not "public utilities" within the meaning of Parts II and III of the Act; (2) that they are instrumentalities of the United States within the meaning of Section 201(f) and are, therefore, exempt from Commission jurisdiction, since Section 201(f) provides that Parts II and III of the Act shall not apply to them. (Pet. App. A-III, p. 17a); *Dairyland Power Cooperative, et al.*, 37 FPC at 15, 17. The Court of Appeals affirmed the Commission's order on the first ground and did not reach the second ground.

STATUTES INVOLVED

Relevant portions of the Federal Power Act, 49 Stat. 838, 16 U.S.C. 791a-825r, are printed as Appendix B to the petition for a writ of certiorari (pp. 25a-38a).

STATEMENT

1. The Petitioners

Petitioners are four of the thirteen member-owners[2] of Colorado-Ute Electric Association, Inc. ("Colorado-Ute"), "a Colorado non-profit cooperative association", engaged in the generation and transmission of electric power and energy for sale only to its members which own and control Colorado-Ute and its electric system which was financed "by loans advanced by the Rural Electrification Administration" ("REA") (R. 6, 7-9[3]). The member-owners of Colorado-Ute, with one exception, are REA-financed rural electric cooperatives, engaged in the transmission or distribution and sale of electric energy to their consumer-owners in Colorado, New Mexico, Utah, and Wyoming (R. 6-9). The exception is Salt River Project Agricultural Improvement and Power District ("Salt River Project"), a political subdivision of the State of Arizona, which sells electric energy to consumers in central Arizona (R. 5-6, 12).

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[2]In addition to Petitioners, the member-owners are San Miguel Power Association, Inc., White River Electric Association, Inc., Holy Cross Electric Association, Inc., Grand Valley Rural Power Lines, Inc., Empire Electric Association, Inc., Delta-Montrose Rural Power Lines Association, San Luis Valley Rural Electric Association, Inc., Bridges Valley Electric Association, Inc., and Salt River Project Agricultural Improvement and Power District (R. 5-9).

[3]References are to the numbers appearing at the bottom of each page of the Joint Appendix filed by Petitioners with their petition in this Court.

2. Background of Commission Proceeding

In February, 1966, the Colorado Supreme Court set aside (R. 15) a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission to Colorado-Ute for the construction and operation of the Hayden electric generating plant and related transmission facilities. *Western Colorado Power Company v. Public Utilities Commission of Colorado*, 159 Colo. 262, 411 P.2d 785, reversing *Re Colorado-Ute Electric Association, Inc.*, 48 PUR 3d 113. Rehearing was denied by the Colorado Supreme Court (159 Colo. 301, 411 P.2d 805), and this Court denied review. *Colorado-Ute Electric Association v. Western Colorado Power Company*, 385 U.S. 22 (1966). The decision rendered the certificate "null and void" (R. 15) and required Colorado-Ute to cease operating the plant which, by then, had been constructed and was delivering power and energy to Colorado-Ute's members.

3. Proceedings Before the Commission

Having failed to reverse the Colorado Supreme Court through recourse to this Court in a final effort to nullify the Colorado Supreme Court's decision (App. A-I, p. 3a), nine of the thirteen member-owners of Colorado-Ute, including the Petitioners, filed a "friendly" (App. A-I, p. 3a) "Petition and Complaint" with the Commission against Colorado-Ute. In their "Petition and Complaint" they sought an order from the Commission asserting jurisdiction over Colorado-Ute as a "public utility" within the meaning of Parts II and III of the Federal Power Act ("Act"),[4] requiring it to file its rate

[4]Under Parts II and III of the Act, a "public utility" is a person who owns and operates facilities for the transmission or sale of electric energy for resale in interstate commerce for ultimate distribution to the public, and is not exempted from Commission jurisdiction by Section 201(f) of the Act which excludes from the coverage of Parts II and III "the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing. . ." (Sections 201(a), (b), (e), (f)).

schedules for the transmission and sale of electric energy, and requiring it to continue operation of the "Hayden Plant, *the decision and order of the Supreme Court of Colorado to the contrary notwithstanding*"[5] (R. 18-19; italics supplied).

In its answer to the "Petition and Complaint", Colorado-Ute neither admitted nor denied its status as a "public utility" as defined in the Power Act (R. 27). Colorado-Ute requested the Commission to determine its status (R. 28), and, subject to that determination tendered to the Commission for filing its contracts and rate schedules with its members (R. 32-35). On motion of the complainants before the Commission, with the concurrence of Colorado-Ute, the question of its status was presented to the Commission on the pleadings for a "final" decision without intermediate reference of the case to a hearing examiner (R. 29-31).

On January 6, 1967, relying on its decision issued the day before in *Dairyland Power Cooperative, et al.*, Opinion No. 511, 37 FPC 12, the Commission, with one Commissioner dissenting, found that Colorado-Ute "is not a 'public utility' within the meaning of that term as used in Section 201 of the Federal Power Act", and, in accordance with that finding dismissed the petition and complaint and directed its Secretary to return to Colorado-Ute the proffered contracts and rate schedules (R. 51-55).

The complainants before the Commission filed a timely application for rehearing and motion for stay (R. 56-83), which the Commission denied on March 3, 1967 (R. 113-115). By separate order, issued the same day, the Commission granted the petitions for leave to intervene, in

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[5] In filing the "Petition and Complaint", they apparently hoped that Commission jurisdiction over Colorado-Ute as a "public utility" and over its sales of Hayden-generated electric energy would make inapplicable the Colorado law certificate requirements to the plant. (App. A-I, p. 3a, note 3.) As the Power Act makes clear, however, the Commission's jurisdiction does not apply to "facilities used for the generation of electric energy" (Section 201(b)).

support of the Commission's order, of Dairyland Power Cooperative ("Dairyland"), Minnkota Power Cooperative, Inc. ("Minnkota"), a group consisting of a Committee of Rural Electric Cooperatives, Statewide Associations of Electric Cooperatives and Eighty-three Rural Electric Cooperatives, and the Secretary of Agriculture (R. 84-112).

4. The Dairyland Case

At the time the member-owners of Colorado-Ute filed their "Petition and Complaint", there was pending before the Commission a proceeding commenced on July 22, 1963, by the issuance of an order against Dairyland, Minnkota, and South Central Rural Electric Cooperative, Inc. ("South Central"), each a nonprofit REA-financed rural electric cooperative, to show cause why they and other REA-financed rural electric cooperatives that may be engaged in the transmission or sale of electric energy for resale in interstate commerce should not be declared to be "public utilities" under Parts II and III of the Power Act and required to comply with the Commission's reporting, accounting and rate schedule filing requirements. *Dairyland Power Cooperative, et al.*, Docket No. E-7113, Order to Show Cause, issued July 22, 1963.

Extensive hearings were held before a Commission Hearing Examiner and comprehensive briefs were filed by Dairyland, Minnkota, and South Central in which they showed, for numerous reasons set forth in their briefs, that REA-financed nonprofit rural electric cooperatives are not "public utilities" under the Act even if they own or operate facilities for the transmission or sale of electric energy for resale in interstate commerce. The same position was taken in briefs filed by the Secretary of Agriculture on behalf of REA, by a Committee of Rrural Electric Cooperatives and several hundred Cooperatives which had been granted leave to intervene as parties to the proceeding.

On January 5, 1967, the Commission issued its Opinion No. 511 in *Dairyland Power Cooperative, et al.*, Docket No.

E-7113, 37 FPC 12 (1967), in which the Commission found and determined that cooperatively-owned electric suppliers financed by the REA do not fall within the scope of the Commission's regulatory jurisdiction over "public utilities" within the meaning of that term in Section 201 of the Act. In a carefully-reasoned, well-documented opinion, the Commission, in a 4 to 1 decision, held that Parts II and III of the Act were directed to privately-owned companies which hold themselves out to render a public service and do not include REA-financed nonprofit rural electric cooperatives.

The Commission reviewed the extensive and rigid supervision and control of the REA Administrator under the Rural Electrification Act over cooperative borrowers and found that the conflicts that the assertion of Commission jurisdiction over cooperatives as "public utilities" would create, confirmed and enforced the conclusion that REA-financed cooperatives were not to be regulated by the Commission (37 FPC at 18, 21-22, 24). Accordingly, the Commission dismissed the order to show cause, saying (37 FPC at 15):

> In our opinion, Congress never intended this Commission to regulate cooperatives under the Federal Power Act. This intention is reflected in the legislative history of the Federal Power Act, is confirmed by the legislative history of the Rural Electrification Act, is strengthened by subsequent expressions by the Congress and is ratified by this Commission's legislative interpretation. Over the past 30 years, these factors compel the conclusion that cooperatives financed by REA are not public utilities within the meaning of Part II of the Federal Power Act.

As a separate, alternate ground for its decision, in reliance on Section 201(f) of the Power Act which exempts instrumentalities of the United States from Commission jurisdiction, the Commission held that the REA cooperatives as "the instrumentalities chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America" are within its exemption (37 FPC at 18).

5. The Court of Appeals' Affirmance of the Commission's Orders

Following denial of rehearing and stay, eight of the nine complainants before the Commission filed a timely petition for review of the Commission's orders of January 6 and March 3, 1967, in the United States Court of Appeals for the District of Columbia Circuit.

After oral argument before the Court of Appeals, the threat to the Hayden Plant, which was the reason for the proceeding before the Commission, disappeared. As the result of agreements reached by Colorado-Ute and the power companies which had fought certification of the Hayden Plant, they withdrew their opposition to the continued operation of the plant. On application of Colorado-Ute to the Colorado Commission, reflecting the arrangements between Colorado-Ute and the power companies, the Colorado Commission issued a second certificate for the continued operation of the plant. *Colorado-Ute Electric Association,* Applications Nos. 22882 and 22905, Decision No. 70608, issued December 22, 1967.

The court below did not regard the case as moot, however, and on February 15, 1968, in a unanimous opinion, affirmed the Commission's orders "on the ground that Colorado-Ute, as an REA-financed cooperative, is not a public utility within the meaning of Parts II and III of the Federal Power Act" (Pet. App. A-I, p. 7a). The Court of Appeals noted, but did not pass, or rely on, the Commission's separate, alternate ground for disavowal of jurisdiction, namely, that REA-financed cooperatives are exempt from the coverage of the Power Act as instrumentalities of the Federal government within the scope of Section 201(f) of the Power Act (Pet. App. A-I, p. 7a).

The Court of Appeals first examined the nature of the REA-financed rural electric cooperatives and their relationship to REA. The court below observed that there are

almost 1,000 REA-financed non-profit cooperatives,[6] organized and owned by their consumer members, of which about 45 "own and operate electric generating plants as well as transmission systems", and the "remainder simply own and operate distribution systems" to provide "electricity to those sparsely settled areas which the investor-owned utilities had not found it profitable to service" (Pet. App. A-I, pp. 5a, 6a).

The Court of Appeals noted that REA, through its lending authority, "exercises extensive supervision over the planning, construction and operation of the facilities it finances" (Pet. App. A-I, p. 6a), requiring REA approval of the cooperative's manager, engineer, and counsel; of its construction contracts and contracts for purchase of materials, equipment and supplies; of its contracts for the purchase and sale of power; of its insurance coverage; of its purchase of land; and of many other matters (Pet. App. A-I, p. 6a).

Because REA's concern "is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperatives' consumers", the Court of Appeals pointed out that REA "furnishes retail rate schedules designed for rural use and assists distribution cooperatives in obtaining electric energy at reasonable costs." (Pet. App. A-I, p. 6a.)

Although the court below regarded "REA regulation and supervision of cooperatives" as "in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities", in the area of "rate-making", it acknowledged, "the cooperatives enjoy a freer hand." (Pet. App. A-I, p. 6a.) "But", the court below said (Pet. App. A-I, pp. 6a-7a):

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[6] As of March 31, 1968, REA reports there were 924 active REA-financed cooperatives. USDA, REA, *Quarterly Statistical Bull.*, Electric Program, No. 247, March, 1968. Petitioners erroneously state (Pet., p. 8, note 9) that the number of REA-financed cooperatives was 1103 in 1967.

it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit.[6] Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

[6]Most of them have devolved a 'capital credits' plan by which all money over and above that required for operating costs is credited back to the member-owners who paid it in. Consequently, neither the cooperative nor any individual can profit from the sale of electricity by the cooperative to its members.

The Court of Appeals held that in enacting Parts II and III of the Power Act, Congress was not concerned with these "peculiar entities, obviously quite unlike investor-owned utilities and subject to comprehensive regulation by another branch of the federal government" (Pet. App. A-I, pp. 7a, 10a-11a). Rather, the Act was aimed at the elimination of financial abuses and rate practices "associated exclusively with investor-owned utilities" which jeopardized investors and extracted excessive utility rate charges from consumers (Pet. App. A-I, pp. 10a-11a). In contrast, the Rural Electrification Act "then lurking in committee" and "conceived contemporaneously" was not enacted in "response to a need for reform in an immense and corrupted industry, but rather constituted simply an attempt, through rural electrification cooperatives, to bring economical electric power to the nine out of ten farms that were then without it" (Pet. App. A-I, p. 11a). The "two Acts were aimed at wholly disparate problems and the supervisory agencies established under them were to deal with fundamentally different sorts of utilities" (Pet. App. A-I, p. 11a).

The Court of Appeals noted (Pet. App. A-I, p. 12a) that "if REA cooperatives were to be made subject to Commis-

sion jurisdiction, Commission conflict with the authority of the Rural Electrification Administration was inevitable." Because of this "inevitable" conflict, the court found in "the congressional unconcern with the impact of the" Power Act on the Rural Electrification Act, and in the fact that "the statutes are directed at very different problems", strong support for "the Commission's position that it is without jurisdiction over REA-financed cooperatives under Parts II and III of the Act" (Pet. App., p. 12a). Congress' "apparent indifference" indicated to the court below that REA-financed cooperatives under the Administrator's jurisdiction "were not intended to fall within" the jurisdiction "of the Commission" (Pet. App. A-I, p. 12a).

Finally, the court below found support for the Commission's interpretation in its administrative practice of over 30 years under the Power Act in which it never sought to exercise general authority over REA-financed cooperatives, and in the fact that despite repeated efforts to secure the enactment of legislation to subject REA-financed cooperatives to Commission controls, Congress never enacted them (Pet. App. A-I, pp. 13a-14a).

ARGUMENT

1. The legislative evidence[7] is overwhelming that Congress in enacting Parts II and III of the Federal Power Act intended to reach only the investor-owned, profit-making, sector of the electric utility industry because of the financial abuses exposed by the Federal Trade Commission investigation which had "taken sums beyond calculation from the rate-paying and investing public." (*Summary Report of Federal Trade Commission*, No. 73-A, (S. Doc. No. 92, Part 73-A), 70th Cong., 1st Sess., p. 63). To eradicate these abuses, which were beyond the reach of the States

[7] H. Rep. No. 1318, 74th Cong., 1st Sess. on S. 2796; S. Rep. No. 621, 74th Cong., 1st Sess. on S. 2796; Hearings on the Public Utility Act of 1935, House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., pp. 391, 424, 437-438, 481, 517, 537-541, 543.

because the electric utility companies had spread across state lines and interstate commerce was involved, Congress passed the Public Utility Act of 1935. Title I of that Act conferred on the Securities and Exchange Commission power to deal with the abuses arising from the holding company structure which then prevailed in the utilities industry. Title II of the Act, comprising Parts II and III of the Power Act, empowered the Commission to deal with the abuses on the operating company level. The Commission was armed with authority to protect the consumers of electric energy by assuring them electric service at reasonable rates and to protect the investors by assuring them sound securities, depreciation and accounting practices. These were the two primary immediate objectives of the Act. *Hearings on the Public Utility Act of 1935, Committee on Interstate and Foreign Commerce, House of Rep., 74th Cong., 1st Sess., p. 391.* As the Commission put it in its *Dairyland* decision (37 FPC at 15):

> . . . The purpose of that legislation was most clear: it was designed to prevent the notorious investment and profit abuses which had developed in the industry under the domination of the holding companies. This is evident on nearly every page of the legislative history. The entire focus of this legislation was directed to the privately-owned companies which held themselves out to render a public service. . . .[8]

Petitioners do not challenge this. They agree (Pet., p. 19) "that there was no need for regulation of cooperatives existing at the time of the passage of the Federal Power Act." "Indeed", Petitioners acknowledge (Pet., p. 19), "there were no cooperatives owning and operating jurisdictional facilities at that time."

Nor do Petitioners assert (Pet., p. 20 and note 33) that there is a need today for regulation by the Commission under

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[8] The Court of Appeals put it this way (Pet. App. A-I, p. 11a):

> . . . the attention of the 74th Congress, in enacting the Federal Power Act, was focused on the sorts of evils associated exclusively with investor-owned utilities.

the Power Act of all of the 924 REA-financed rural electric cooperatives, even though some of them may be engaged in interstate commerce.[9] Petitioners argue only that since 1963 there has been a need for Commission regulation under Parts II and III of the Power Act because by that time there were 43 generation and transmission cooperatives[10] ("G&T Coop-

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[9]For example, San Miguel Power Association, Inc., a complainant before the Commission and a petitioner in the court below, but not here, is engaged in the "transmission, distribution, and sale of electric power and energy to its consumers" in "the State of Colorado . . . and . . . in the State of Utah" (R. 6-7). So, also, La Plata Electric Association, Inc., another complainant before the Commission and a petitioner in the court below and here, is "engaged in the transmission, distribution and sale of electric power and energy to its consumers" in "the State of Colorado, and . . . in the State of New Mexico" (R. 6). Yampa Valley Electric Association, Inc., also a complainant before the Commission and a petitioner in the court below and here, is engaged in "the purchase, distribution and sale of electric power and energy to its consumers . . . in the State of Wyoming and . . . in the State of Colorado." (R. 8) Each of these REA-financed rural electric cooperatives purchases electric energy having out-of-state origin (R. 11, Par. No. 5; R. 12-13, Par. Nos. 7 and 8).

[10]The first G&T Cooperative was organized in 1937. By 1954 more than half of the 43 G&T Cooperatives were in existence, and 20 of the 32 G&T Cooperatives having generating facilities. Despite the name, each G&T Cooperative does not own and operate generating facilities. In 1966, the latest year for which published statistics are available, 25 of them owned and operated their generating facilities, 7 owned but did not generate energy in 1966, relying entirely on purchased power to meet their members' requirements, and 11 owned no generating facilities, also relying on purchased power to meet member requirements. Rural Electrification Administration, U.S.D.A., *1966 Annual Statistical Report, REA Bull. 1-1*, pp. 248-257. The G&T Cooperatives are scattered over 17 states; about 24 being located in the Midwest. *Id.* The total generating capacity of the G&T Cooperatives was 2,316,046 kw or about 1.2% of the generating capacity (158,576,000 kw) of Class A and B (those having annual electric revenues of $1,000,000 or more) investor-owned electric utilities. In 1965, the generating capacity of municipally-owned electric utilities, which are exempt from the Power Act (Section 201(f)), was 19,106,057 kw. Federal Power Commission, *Statistics of Electric Utilities in the United States, Publicly-Owned*, 1965, Table 15, p. XV. When the

eratives") (Pet., pp. 19-20.[11]

2. As heretofore noted, the objectives of the Power Act were two-fold: (1) to reach and eradicate the financial abuses prevalent in the investor-owned sector of the electric companies; and (2) to assure consumers of electric energy service at reasonable rates. Petitioners do not suggest, and they could not, that rural electric cooperatives, including G&T Cooperatives, financed entirely by REA and subject to REA's close supervision and control, have engaged in financial abuses which require the regulatory intervention of the Commission. The petition will also be searched in vain for any suggestion by Petitioners that Commission rate regulation is necessary to assure reasonable rates to customers of these REA-financed G&T Cooperatives.

The G&T Cooperatives with generating facilities were organized by distribution cooperatives in some parts of the country to free them of their dependence upon purchased power for their power requirements and to achieve lower power costs.[12] Other G&T Cooperatives were organized by

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generating capacity of these municipally-owned projects, of federal projects, and of small investor-owned electric utilities are considered, the 1.2% becomes an infinitesimal percentage of the electric industry's generating capacity.

[11] On the basis of the definition of "public utility", without regard to other considerations, Petitioners argue that the Power Act applies to G&T Cooperatives. On that same basis, the Power Act would also apply to REA-financed cooperatives that do not generate electric energy but are engaged in interstate transmission or sale of energy. Inconsistently, however, Petitioners would not apply the Power Act to them, apparently on the basis of considerations beyond the mere definition of "public utility".

[12] Petitioners concede (Pet., pp. 9-10) that "generation and transmission cooperatives have substantially enhanced the competitive position of rural electric systems in their negotiations with commercial power companies for wholesale power. Their continuation as a viable segment of the electric industry is essential." This has occurred under the supervision and control of REA. Commission regulation is obvi-

distribution cooperatives to achieve lower purchased power costs by combining their power requirements for purchase purposes. The G&T Cooperatives have secured purchase and pooling arrangements which are mutually beneficial to the cooperatives, the power companies and the ultimate consumers.[13] The G&T Cooperatives are consumer-owned and controlled. They operate on a non-profit basis and are self-regulating. There is no motive to overcharge. If the rates produce more than the cost of service, the same consumers own and ultimately recover these margins and pass them on to the ultimate consumers.[14]

3. The fact that G&T Cooperatives are not subject to Commission jurisdiction does not mean that there is a regulatory void, as Petitioners argue (Pet., p. 10). As noted earlier in this brief, *supra*, pp. 7, 9, the rural electric cooperatives, G&T Cooperatives included, in every aspect

ously not required to assure their continuation "as a viable segment of the electric utility industry". In fact, one may wonder, in light of the difficulties of Colorado-Ute and its Hayden Plant, whether this would have come to pass and whether generation and transmission cooperatives could remain a "viable segment of the electric utility industry" if power companies secure the Commission as a forum to harass and impede the cooperatives. This is no reflection on the Commission or its intentions; this is merely a statement of a fact of life.

[13] By reason of the Commission's jurisdiction over the power companies, these transactions are subject to the Commission's regulatory control and scrutiny under Section 205 of the Power Act as to rates and the terms and conditions of the transaction.

[14] Petitioners argue (Pet., p. 21) that G&T Cooperatives are not effectively self-regulating because in a number of situations some of the G&T Cooperatives sell electric energy to non-members. These sales are minor and do not alter the fact that essentially the G&T Cooperatives are consumer-owned. Revenues from sales to non-members are only 6.1% of the total sales revenues of G&T Cooperatives. Some of these sales may not be in interstate commerce, but to the extent that they are and are involved in pooling arrangements, they are subject to Commission control under Parts II and III through Commission regulation of the power companies. The incidental transactions with non-members do not support Petitioners' claimed need for Commission regulation of the G&T Cooperatives.

of their activities, are subject to the control and supervision of REA, which is "in many respects, far more comprehensive than that which the Federal Power Commission exercises over investor-owned utilities" (Pet. App. I-A, p. 6a). REA control and supervision, rather than Commission control, was the deliberate choice of Congress,[15] and was consistent with its desire to give the REA Administrator "almost unlimited discretion" and "extraordinary power" to "oversee effectively the rural electrification program", 80 Cong. Rec. (Part 3) 3308, 3313 (1936); 80 Cong. Rec. (Part 5) 5277, 5281 (1936); Pet. App. A-I, p. 12a.[16] Since then Congress has time and again rebuffed attempts either to make the REA's authority in some way subject to Commission jurisdiction or to otherwise restrict it.[17] Most recently, bills were introduced as the result of the Commis-

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[15]Congress' deliberate choice of REA control and supervision over REA-financed cooperatives and the existence thereof, distinguishes this case from *Southwestern Cable* (*United States v. Southwestern Cable Co.*, 36 L.W. 4553 (June 10, 1968)), where, absent FCC jurisdiction over CATV Systems, a regulatory void would have existed which would jeopardize achievement of the goals of the Communications Act of 1934.

[16]In a letter to the Committee on Forestry and Agriculture, dated February 17, 1936, commenting on the Rural Electrification Act of 1936, then pending before the Congress, the Commission never suggested that the Federal Power Act conferred any jurisdiction over cooperatives on the Commission. It referred only to the fact that the pending legislation "proposed duplication of functions now delegated to this Commission" in that the bill authorized the Administrator to make certain studies and investigations respecting the progress of rural electrification. The Commission advised that the Federal Power Act delegated to the Commission similar responsibility. It is unlikely that if the Federal Power Act conferred other areas of authority over rural electric cooperatives on the Commission that it would have remained silent as to those and would have mentioned only a minor duplication in the field of reports. Congress, desirous of giving the Administrator a free hand, ignored the duplication and made no change in this provision of the Rural Electrification Act.

[17]H.R. 6292, 76th Cong., 1st Sess., 1939—a bill to require Commission determination that a generating plant would result in lower

sion's show cause order in the *Dairyland* case, *supra*, to confirm that cooperatives are not subject to Commission jurisdiction. Introducing S. 2028 bill, Senator Humphrey stated:

> The law is clear. We would not need new legislation except for the stubbornness of some people who are pursuing an illegal course in the face of the provisions of the law in this case, as expressly stated by Congress. 109 Cong. Rec. (Part 11) 14533 (1963). See also the debate on S. 1459, 111 Cong. Rec. (Part 16) 22018-22034 (1965).

4. If G&T Cooperatives were subject to Commission jurisdiction, inevitable and irreconcilable conflicts between REA and the Commission would prevail in many areas of the cooperatives' operations, including rates, accounting, financing, acquisition and disposition of property, and extension of service. (*Dairyland*, 37 FPC at 21). The existence of these conflicts argues strongly against Commission jurisdiction. On this subject, the Commission in *Dairyland* correctly said (37 FPC at 26):

> . . . The record in this proceeding is replete with evidence on the question of the exact extent to which the Administrator exercises authority over cooperatives which would conflict with what the Commission requires under its statutory mandate. It is not for us to resolve this conflict. Congress has

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cost electricity before REA could make a loan therefor. No action on the bill. (84 Cong. REC. 5480)

H.R. 5555, 79th Cong., 2d Sess., 1946—a bill to require consent of the Commission in the absence of state jurisdiction before REA could make a generating plant loan. No action on the bill. (92 Cong. Rec. 1571)

H.R. 2709, 80th Cong., 1st Sess., 1947—a bill similar to H.R. 5555, *supra*. No action was taken on the bill. (93 Cong. Rec. 2423)

House Report No. 450, Committee on Appropriations, 80th Cong., 1st Sess., May 1947—a proposal to confer upon the Commission or upon state commissions power to veto REA loans respecting generating plants. No such authority was conferred.

expressly authorized the Administrator to exercise virtually unlimited and continuing regulatory authority over the operations of cooperative borrowers, which authority has been fully exercised for over thirty years.

5. In further support of the Commission's disavowal of jurisdiction over REA-financed rural electric cooperatives is the Commission's administrative practice of over 30 years under the Act. In that long period, the Commission never decided that "cooperatives are jurisdictional" and did not seek "to exercise such jurisdiction". *Dairyland,* 37 FPC at 23-25; Pet. App. A-I, pp. 12a-13a.

Contrary to Petitioners' contention (Pet., pp. 14-15), there is no inconsistency between the Commission's long administrative interpretation, its decision in *Dairyland,* and this case on the one hand, and its finding in *Buckeye Power Inc. and Ohio Power Company,* Docket No. E-7355, Order issued August 4, 1967, that Buckeye is a "public utility". Although organized by 28 rural electric cooperatives, Buckeye was financed completely by *private* capital. It is *not* an REA-financed cooperative. As a privately-financed venture, engaged in the ownership and operation of facilities for the transmission and sale of electric energy in interstate commerce, Buckeye came within the coverage of Part II like any other privately capitalized interstate electric utility.

6. Nor is there a conflict, as Petitioner implies (Pet., pp. 16-17), between the decision of the court below and the decision of the Ninth Circuit in *City of Anchorage v. Chugach Electric Ass'n,* 252 F.2d 412 (1958) on the question whether REA-financed cooperatives are exempt from Commission jurisdiction as government instrumentalities. The Ninth Circuit held that they were not government instrumentalities. As an alternate ground for its decision, in the present case the Commission held that REA-financed cooperatives are exempt as government instrumentalities under Section 201 (f) of the Power Act. The court below affirmed the Commission's decision with respect to Colorado-Ute on the

ground that it was not a "public utility" within the meaning of Parts II and III of the Power Act. That court "carefully avoided reaching the question whether REA-financed cooperatives were also exempt as government instrumentalities under Section 201(f)". *City of Paris, Kentucky v. FPC*, CADC No. 21,375, ___ F.2d ___ (July 3, 1968). In the circumstances there is no conflict for this Court's resolution between the decision of the court below in the present case and the decision of the Ninth Circuit, or, for that matter, between the decision of the court below in this case and its decision in *City of Paris, supra*, where it held that REA-financed cooperatives are not government instrumentalities for purposes of Section 201(f) of the Act.

7. Petitioners seek support for their interpretation of the Power Act in the Commission's position before Congress that it would be in the public interest for Congress to enact legislation giving the Commission jurisdiction over interstate G&T transmission cooperatives because, it is alleged, they "have become an important segment of the interstate electric industry, at least in certain parts of the country" (Pet., pp. 11-12 and notes 17 and 18). Assuming, *arguendo*, they are,[18] the Commission, unlike Petitioners, has gone to the right forum. The Commission has recognized that the legislature is the proper forum; Petitioners have not. There the question of need for Commission regulation of G&T Cooperatives and the type of regulation[19] can be examined in a proper legislative context and a decision made.

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[18]With all deference to the Commission, the importance of the G&T Cooperatives in the electric utility industry has been overdone. *Supra*, note 10, p. 13.

[19]The Commission has never asserted a need for rate regulation. The Commission's concern appears to be in the area of planning and interconnections to assure reliability of service. Thus, in the Electric Power Reliability Bill (S. 1934, 90th Cong., 1st Sess.) which the Commission has presented to Congress for its consideration, the Commission would have jurisdiction over planning and interconnections of all segments of the electric industry: federal, state, municipal, investor-owned and REA-financed.

8. Finally, Petitioners argue that regulation by the Commission is necessary to avoid "competing and conflicting regulation by state agencies in portions of the area served" and the "piecemeal and potentially inconsistent regulatory activities by diverse state agencies which inevitably result in discrimination as between purchasers and discourage and impede the orderly, systematic and progressive development of the industry in a manner best suited to serve the public." (Pet., p. 10). Petitioners' dissatisfaction with state regulation will not be assisted through Commission regulation of the interstate activities of G&T Cooperatives, and is not a sound basis for reading into the Power Act regulation of REA-financed cooperatives that Congress never intended. This case was started in the Commission in an effort to avoid the certificate requirements of Colorado State law, although Commission jurisdiction over sales of electric energy in interstate commerce by Colorado-Ute would not necessarily make the state certificate requirements inapplicable. (Sec. 201(b)). Apparently, Petitioners' real purpose in seeking Commission regulation of cooperatives is the continued effort to eliminate state regulation. Commission regulation extends "only to those matters which are not subject to regulation by the states" (Sec. 201(a)), and does not extend to "facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." (Sec. 201(b)). These matters would remain subject to State regulation even if G&T Cooperatives were subject to Commission regulation under Parts II and III of the Power Act.

CONCLUSION

This is not a case in which the decision that the Power Act does not reach REA-financed cooperatives, leaves them unregulated, and impairs achievement of the objectives of the Power Act. REA-financed cooperatives are subject to the close supervision and control of the REA Administrator

as the result of a deliberate choice made by Congress in almost contemporaneous consideration of the Power Act and Rural Electrification Act. No objective of the Power Act requires Commission regulation, for REA-financed cooperatives have not been involved in financial abuses, and in matters of rates, they are self-regulating, being consumer-owned and operated.

The decision of the court below is correct. There is no conflict of decisions. No further review by this Court of the decision is, therefore, required. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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